A

TOP STRATA MANAGEMENT SDN BHD v. PERBADANAN PENGURUSAN BUKIT DESA KONDOMINIUM

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[APPEAL NO: WA-12BNCvC-90-07-2023]
29 MARCH 2024

B

Abstract – *An employer can be held vicariously liable for its employee's intentional wrongdoing if the vicarious liability test as set out in GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir is satisfied. The four common denominators to be proven under the said test are: (i) the intentional wrong must be committed by the employee in the course of employment; (ii) there must be connection between the wrongful act and the nature of the employment; (iii) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and (iv) the risk is created by the employer, owing to the features of the business. The additional factor to be considered is whether the employee's unlawful action was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable.*

C

D

E

TORT: *Vicarious liability – Employer and employee – Company appointed by management corporation of condominium to provide property management services – Employee of company misappropriated sum of money from bank account of management corporation – Whether company vicariously liable towards employee's intentional wrongdoing – Whether four common denominators of vicariously liability test set out in GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir satisfied*

F

CIVIL PROCEDURE: *Appeal – Appeal against decision of Sessions Court – Sessions Court found company vicariously liable towards its employee's acts of misappropriating sum of money from management corporation of condominium's bank account – Whether Sessions Court erred in its decision – Whether appellate intervention ought to be applied – Whether four common denominators of vicariously liability test set out in GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir satisfied – Whether it was proven employee had stolen sum of money – Whether management corporation contributorily negligent*

G

H

The appellant was a company providing property management services, while the respondent was a management corporation of a condominium. Pursuant to the appellant's appointment by the respondent to provide its services to the respondent's condominium, the second defendant, an employee of the appellant, among others, was placed at the condominium as a full-time on-site building manager. Nonetheless, after the respondent

I

prepared its year end accounts for the year 2019, *via* the assistance of the respondent's bankers, the respondent discovered that an amount of RM314,542.97 was missing from its account. This caused the respondent to sue the appellant and the second defendant at the Sessions Court. The respondent's case against the second defendant was that second defendant had, with the intention to unjustly enrich himself, wrongfully and/or fraudulently: (i) misappropriated the amount of RM314,542.97 from the respondent's account; and (ii) falsified and/or forged, among others, bank statements, bank in slips and FD certificates ('respondent's documents') of the respondent to perpetrate fraud against the same. Meanwhile, the respondent's case against the appellant was that, since the appellant was the employer of the second defendant, the appellant was vicariously liable towards the misappropriation of monies by the second defendant. The full trial against the appellant commenced after a judgment was obtained against the second defendant and the same was charged in a criminal court. After the full trial, the Sessions Court allowed the respondent's suit and ordered the appellant to pay the plaintiff: (i) a sum of RM314,542.97; (ii) damages for breach of contract in the sum of RM7,000; (iii) exemplary and aggravated damages in the sum of RM5,000; (iv) interest at the rate of 5% per annum on items (i) to (iii) to be paid from 21 June 2023 until their full settlement; and (v) costs in the sum of RM7,000. Aggrieved, the appellant filed an appeal against the said orders in this court. The issues that arose were: (i) whether the appellant as the second defendant's employer was vicariously liable for the second defendant's misappropriation of monies; (ii) whether the respondent failed to prove that the second defendant had stolen RM314,542.97 from the respondent; and (iii) whether the Sessions Court erred in failing to consider the respondent's contributory negligence.

Held (allowing appeal in part):

(1) The four common denominators of the vicarious liability test as set out in *GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir* were satisfied because: (i) the appellant was appointed by the respondent to provide property management services for the condominium *via* a written contract which was renewed yearly; (ii) the appellant had stationed several staffs at the condominium; (iii) the second defendant was placed at the condominium due to the management contract entered by the appellant and the respondent; (iv) the misappropriation of monies could only be committed by the second defendant due to his position as it gave him access to the respondent's documents; (v) the second defendant's unlawful action was closely connected with his employment that it would be fair and just to hold the appellant, as his employer, vicariously liable; and (vi) the nature of the work carried out by the second defendant exposed the respondent to the risk of misappropriation of monies and the

opportunity to commit it. Therefore, the appellant was vicariously liable for the misappropriation of monies committed by the second defendant. (paras 35, 42 & 43)

(2) Appellate intervention was not warranted in this appeal. The testimonies of PW1, PW3 and the second defendant as well as the documents produced justified the Sessions Court to arrive at a finding that the respondent had proven that the second defendant had stolen RM314,542.97 from the respondent. The second defendant could not deny that he had stolen the said monies as, although he was served with the writ of summons, he had never filed an appearance to defend the suit. The judgment obtained against the second defendant was never set aside. Therefore, the said judgment remained as a valid judgment and proof of fraud of the second defendant. The second ground of appeal was set aside. (paras 52-54, 61-63 & 66)

(3) Even if the appellant was allowed to run the defence of negligence by the respondent, the appellant had not proven its assertion that the misappropriation of monies by the second defendant was caused or contributed by the respondent's alleged contributory negligence. As there was no cogent evidence for appellate intervention to be applied on the Sessions Court's finding of fact, the third ground of appeal was dismissed. The Sessions Court had not erred in failing to consider the respondent's alleged contributory negligence. (paras 71 & 72)

(4) The appeal was partly allowed and the following orders were made: (i) the order of the Sessions Court to award general, aggravated and exemplary damages and costs was set aside; (ii) the award of RM314,542.97 was maintained; (iii) interest at the rate of 5% per annum on the sum awarded to be paid from 21 June 2023 until the full settlement of the said sum; and (iv) each party to bear their own costs for this appeal and court below. (para 10)

Case(s) referred to:

GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir [2022] 10 CLJ 669 FC ***(foll)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Keppel Bus Co Ltd v. Sa'ad Ahmad [1974] CLJU 62; [1974] 1 LNS 62 ***(refd)***

Lee Woon Jeng v. Excel Champ Automobile Sdn Bhd [2015] 5 CLJ 979 HC ***(refd)***

Lister v. Hesley Hall Ltd [2002] 1 AC 215 ***(refd)***

Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(refd)***

Mohamud v. WM Morrison Supermarkets Plc [2014] 2 All ER 990 ***(refd)***

Morris v. CW Martin & Sons Ltd [1966] 1 QB 716 ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Redgrave v. Hurd [1881] 20 Ch D1 ***(refd)***

Samin Hassan v. Government Of Malaysia [1976] CLJU 139; [1976] 1 LNS 139 FC ***(refd)***

Standard Chartered Bank v. Pakistan National Shipping Corporation And Others (Nos 2 And 4) [2003] 1 AC 959 ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Yahaya Mohamad v. Chin Tuan Nam [1975] CLJU 195; [1975] 1 LNS 195 PC ***(refd)***

For the appellant - Jennifer Hiu Jing Yin, Syafiqah Sofian & Lau Zhi Ying; M/s Othman Hashim & Co
For the respondent - Gayathri Chandrakasan; M/s Rao & Kamal

[Editor's note: Appeal from Sessions Court; Civil Suit No: WA-B52NCvC-232-05-2021.]

Reported by Syamim Ariffin

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] The law on vicarious liability states that in certain circumstances, an employer can be held liable for an act of negligence or an intentional wrong committed by his employee, where no fault can be attributed to the employer.

[2] The jurisprudence behind vicarious liability is that some relationships by their very nature require the person who engages others to accept responsibility for the wrongdoing of those others. However, the test to be used to hold an employer vicariously liable has vexed the courts for years since its origin in the common law in the 17th century.

[3] In these grounds of judgment, I will review the various tests formulated by courts in the unending and elusive search for perfection.

[4] Parties shall be referred to as they were cited at the Sessions Court.

[5] The appeal before me by the first defendant deals with the vicarious liability of the first defendant for the misappropriation of monies by its employee, A Rahman bin Sabar, the second defendant, totaling RM314,542.97 while assigned to work at the plaintiff's condo office from 2017 to 2019.

[6] The key issue is whether the first defendant, a company that provides property management services to the plaintiff's condo, is vicariously liable for an intentional wrongdoing *ie*, monies stolen by its employee, the second defendant, who was assigned to provide the first defendant's management services to the condo.

[7] A related issue is whether an employer, the first defendant, resisting a claim for vicarious liability can plea in its defence that the plaintiff has allowed the wrongdoing by the first defendant's employee/the second defendant by its own negligence and or contributory negligence.

[8] The Sessions Court after a full trial has ruled in favour of the plaintiff and ordered the first defendant to pay the plaintiff:

(i) a sum of RM314,542.97;

(ii) damages for breach of contract in the sum of RM7,000;

(iii) exemplary and aggravated damages in the sum of RM5,000;

(iv) interest at the rate of 5% per annum on items (i) to (iii) above to be paid from 21 June 2023 until the full settlement thereof; and

(v) cost in the sum of RM7,000.

[9] The judgment of the Sessions Court can be seen in encl. 22 additional appeal record pp. 4 to 9. The grounds of judgment can be seen in encl. 22 additional appeal record pp. 10 to 35.

[10] Dissatisfied, the first defendant filed an appeal to the High Court. On 20 February 2024, I have allowed the appeal partly and made the following orders:

(i) the order of the Sessions Court to award general, aggravated and exemplary damages and cost is set aside;

(ii) the award of RM314,542.97 is maintained;

(iii) interest at the rate of 5% per annum on sum awarded to be paid from 21 June 2023 until the full settlement thereof; and

(iv) each party to bear own costs for this appeal and court below.

[11] Dissatisfied again, the first defendant, on 20 March 2024, filed an appeal to the Court of Appeal against my order to maintain the award of RM314,542.97. These are my grounds of decision which will only deal with my reasons to maintain the award of RM314,542.97. My grounds will not consider my orders, which have not been appealed on.

[12] As the appeal records have been filed in a haphazard manner by the solicitors, it is best I state at the outset here the enclosure numbers for the more relevant appeal records:

(i) appeal record Part B encl. 20 contains the witness statements;

(ii) appeal record Part D (vol. 4A) encl. 18 contains the pleadings, agreed facts and issues to be tried;

(iii) appeal record Part D (vol. 4B) encl. 19 contains the notes of proceedings in the Sessions Court; and

(iv) additional appeal record encl. 22 contains the Sessions Court's grounds of judgment and the judgment against the appellant, who is the first defendant.

Background Facts

[13] The plaintiff is the management corporation for "Bukit Desa Kondominium" ("Bukit Desa Condo").

[14] The first defendant is a private limited company providing "management of property and other services". The second defendant was an employee of the first defendant at all material times.

[15] The first defendant was appointed by the plaintiff to provide property management services for Bukit Desa Condo. The first defendant assigned the second defendant as the full-time on-site building manager together with a few other junior staff.

[16] The plaintiff, when preparing for the year-end accounts for 2019, detected missing monies in the plaintiff's accounts. With the assistance of the plaintiff's bankers (Public Bank, Taman Desa branch), the plaintiff discovered RM314,542.97 missing.

Suit In The Sessions Court

[17] The plaintiff sued the first and second defendants in the Sessions Court. The writ and statement of claim can be seen in appeal record Part D vol. 4A encl. 18 pp. 3004 to 3021.

[18] It was the plaintiff's case that the second defendant, with the intention to unjustly enrich himself, had *inter alia*, wrongfully and/or fraudulently:

(i) misappropriated RM314,542.97 from the plaintiff in the period from 2017 to 2019; and

(ii) made or caused to be made, falsified and/or forged bank statements, bank in slips and FD certificates and replacing the genuine documents with the falsified and/or forged documents in order to perpetrate the fraud on the plaintiff.

[19] The second defendant failed to enter an appearance and a judgment in default of appearance was entered on 16 August 2021 against the second defendant. The learned Sessions Court Judge ordered the second defendant to pay the plaintiff:

(i) a sum of RM314,542.97;

(ii) interest at the rate of 5% per annum on such sums as may be ordered by the Honourable Court to be paid from 24 May 2021 until the full settlement thereof; and

(iii) cost in the sum of RM1,296.

[20] It was further ordered that the second defendant shall:

(i) give an account of all monies received by the second defendant and the second defendant shall pay the plaintiff of all the sums found to be due on the taking of the account;

(ii) pay the plaintiff aggravated and/or exemplary damages which will be assessed; and

(iii) pay the plaintiff interest at the rate of 5% per annum on such sums as may be assessed by the Honourable Court from the date of the assessment until full settlement;

(iv) cost on solicitor-client basis which will be assessed.

[21] On 24 December 2021, the learned Sessions Court Judge gave final orders after assessment of damages against the second defendant and ordered that the second defendant shall pay the plaintiff as follows:

(i) exemplary damages in the sum of RM15,000;

(ii) aggravated damages in the sum of RM15,000; and

(iii) cost for the assessment of damages proceeding in the sum of RM2,000.

[22] No setting aside or appeal was filed by the second defendant against these orders.

[23] A police report was lodged by the plaintiff against the second defendant and the second defendant has been charged in the criminal court. (See additional record of appeal ("AROA") para. 13 of ground of judgment at p. 16).

[24] Having obtained the judgment against the second defendant, the matter then proceeded for full trial between the plaintiff and the first defendant.

Suit Against The First Defendant

[25] The trial was held over three days. A total of seven witnesses were testified. They were:

(i) Gills Marinus Geelhoed PW1 retired engineer/chairman of the plaintiff.

(ii) ASP Suhaila binti Abdul Rahman PW2 police investigating officer.

(iii) Tan Ching Sein PW3 Public Bank Banking Services Manager.

(iv) A Rahman bin Sabar DW1 (subpoenaed) building manager/technician of the first defendant at the material time/second defendant.

(v) Sivalingam a/l T Vadivelu DW2 operational director of the first defendant.

(vi) Goh Yow Hui DW3 director of the first defendant.

(vii) Jonathan V Ven Lek DW4 assistant manager of MSM International Loss Adjuster.

[26] On 21 June 2023, after a full trial, the learned Sessions Court Judge allowed the plaintiff's claim against the first defendant and ordered the first defendant to pay the plaintiff:

(i) a sum of RM314,542.97;

(ii) damages for breach of contract in the sum of RM7,000;

(iii) exemplary and aggravated damages in the sum of RM7,000;

(iv) interest at the rate of 5% per annum on items (i) to (iii) above to be paid from 21 June 2023 until the full settlement thereof;

(v) cost in the sum of RM7,000.

[27] The first defendant appealed to me.

The Appeal Before Me

[28] The first defendant relied on the following grounds:

(i) the first defendant, as the employer of the second defendant, is, not vicariously liable for the second defendant's alleged fraudulent acts;

(ii) the plaintiff has failed to prove the second defendant has stolen RM314,542.97 from the plaintiff;

(iii) the Sessions Court had erred in failing to consider the plaintiff's contributory negligence.

[29] I shall consider each ground one by one.

Ground i - The First Defendant As The Employer Of The Second Defendant Is Not Vicariously Liable For The Second Defendant's Alleged Fraudulent Acts

The Law On Vicarious Liability

[30] As stated earlier, the law on vicarious liability states that in certain circumstances, an employer can be held liable for an act of negligence or an intentional wrong committed by his employee where no fault can be attributed to the employer.

[31] The jurisprudence behind this strict liability is that some relationships by their very nature require the person who engages others to accept responsibility for the wrongdoing of those others.

[32] The test for vicarious liability has troubled the courts for years. It has resulted in the formulation of various tests over the years.

[33] The leading authority in Malaysia on vicarious liability is *GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir* [2022] 10 CLJ 669, in particular the leading judgment of Harmindar Singh Dhaliwal FCJ, who was in the happy position of referring to his earlier High Court decision on vicarious liability in *Lee Woon Jeng v. Excel Champ Automobile Sdn Bhd* [2015] 5 CLJ 979 per Harmindar Singh Dhaliwal J.

[34] The tests that have been formulated over the years, as the courts struggled to find a fair test that can be applied in a non-capricious manner, are:

(i) "on a frolic of his own" test – vicarious liability cannot be imposed if the employee had acted on a frolic of his own as his actions were outside the scope of his duties and were not authorised by his employer. (See *Samin Hassan v. Government Of Malaysia* [1976] CLJU 139; [1976] 1 LNS 139; [1976] 2 MLJ 211 and *Keppel Bus Co Ltd v. Sa'ad Ahmad* [1974] CLJU 62; [1974] 1 LNS 62; [1974] 1 MLJ 191).

(ii) "in the course of employment" test or sometimes referred to as the "scope of employment" test – the "frolic of his own" test was criticised as vague and unhelpful as it does not provide a sufficient basis for determining the existence or limits of vicarious liability. It begs the question. To call an action a 'frolic' is not to give a reason why it is outside the course of employment. It only expresses a decision already made that it is outside. The test was therefore rephrased as – an employer is vicariously liable for a tort committed by an employee in the course of his or her employment. (See Diplock LJ in *Morris v. CW Martin & Sons Ltd* [1966] 1 QB 716 at p. 733).

(iii) the "*Salmond* test" from the first edition of *Salmond on Torts* way back in 1907 – this test required that before vicarious liability can be inferred, there must exist a relationship of 'master and servant, between the defendant and the person committing the wrong. The servant, in committing the wrong, must have been acting in the course of his employment. A servant is deemed to be acting in the course of his employment if his act is either (i) a wrongful act authorised by the master; or (ii) a wrongful and unauthorised mode of doing some act authorised by the master.

(iv) the "refined *Salmond* test" from a later edition of *Salmond on Torts* – an employer is liable even for unauthorised acts if they are so connected with authorised acts that they may be regarded as modes – although improper modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.

(v) the 'close connection' test – the *Salmond* test did not actually work well in cases of intentional wrongdoing. Therefore, the House of Lords in 2002, adopted a different test, that is, an employee will be held to have

acted in the course of his employment when he committed a tort if that tort was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable for that tort. (See *Lister v. Hesley Hall Ltd* [2002] 1 AC 215).

(vi) the 'close connection' test was later restated in 2014 as a two-stage test of vicarious liability. The first stage involves a consideration of the relationship between the primary wrongdoer and the person alleged to be liable and whether that relationship is capable of giving rise to vicarious liability. The second stage relates to whether there is a sufficiently close connection between the wrongdoing and the employment so that it would be fair and just to hold the employers vicariously liable. (See *Mohamud v. WM Morrison Supermarkets Plc* [2014] 2 All ER 990 and on appeal reported as [2016] UKSC 11; [2016] AC 677, *Lee Woon Jeng v. Excel Champ Automobile Sdn Bhd* [2015] 5 CLJ 979 per Harmindar Singh Dhaliwal J).

(See *GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir* [2022] 10 CLJ 669 at (26 to 37) per Harmindar Singh Dhaliwal FCJ)

[35] In *GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir* [2022] 10 CLJ 669, the Federal Court laid down the vicarious liability test to be used in Malaysia in these terms:

> [31] In our considered opinion, and after considering the prevailing law we have set out in the foregoing discussion, the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following common denominators:
>
> (i) the intentional wrong must be committed by the employee in the course of employment;
>
> (ii) there must be connection between the wrongful act and the nature of the employment;
>
> (iii) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and
>
> (iv) the risk is created by the employer, owing to the features of the business.

[36] In a later part of the judgment, the Federal Court stressed that an additional factor to be considered is to ask whether the employee's unlawful action was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. This is how the Federal Court puts it:

> [36] *Now, Jaafar's actions may have been unauthorised by his employer but the pertinent question to ask is whether Jaafar's actions in unlawfully discharging his firearm and causing injury to Amirul was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable*. On the facts of this case and for the reasons we have already stated, the answer must be yes. To put it in another way, Jaafar's wrongful act was not

independent from the task he was employed to do. In this connection, it is apposite to recall the words of Lord Millet in the House of Lords case of *Lister v. Hesley Hall Ltd* (*supra*):

> So, it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. ...
>
> The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind.
>
> [37] *There was also a common thread in the plethora of cases cited to us* (see for example, …) *in that, the nature of the work carried out by the employees exposed third parties (the innocent members of the community) to the risk or danger to their lives or safety, and, the same nature of the work allowed the malevolent employees the opportunity to commit the intentional wrong on the third parties.*
>
> (emphasis added)

[37] It is useful to see how the Federal Court in *GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir* [2022] 10 CLJ 669 answered the question of vicarious liability to see how in practice the test is applied.

[38] The facts of the case were that GMP Kaisar Security (M) Sdn Bhd ('GMP'), entered into a contract with North Metal Industrial Sdn Bhd, *inter alia*, to provide North Metal with the service of an armed personal bodyguard. GMP subsequently employed one Jaafar as a personal bodyguard and assigned him as a bodyguard for one Dato' Ong Teik Kwang, known as Dato M ('Dato M').

[39] Jaafar, during the performance of his duty as a personal bodyguard for Dato M, equipped with a Glock automatic provided by GMP, suddenly shot and killed Dato M, who was driving his BMW PWF 11 along Tun Dr Lim Chong Eu Expressway leading to the Penang Bridge. Jaafar was at that time sitting at the back of the car. Thereafter, Jaafar alighted from the car and fired randomly with the firearm at members of the public. The respondent ('Amirul') was one of the victims. He was shot by Jaafar in the chest at close range and sustained serious bodily injuries. Amirul filed a claim in tort against Jaafar, as the primary tortfeasor, and GMP for vicarious liability for Jaafar's action.

[40] The Federal Court ruled that there was vicarious liability on the part of GMP for these reasons:

> [32] Applying these factors to the instant case, we do not see how the High Court and the majority in the Court of Appeal had erred in applying the close connection test. In our view, there cannot be any blemish on the decisions of the courts below for the following reasons.

[33] At the forefront, the standout factor is the feature of GMP's business. It is a private agency that offers the service of armed bodyguards, among others. GMP is the registered owner of the firearms with the carry and use licence issued by the Home Minister. … It is therefore GMP which equips or provides firearms to its employees who are designated to the position of personal bodyguards. In the instant case, *GMP equipped Jaafar with the Glock automatic*.

[34] More significantly, *it was GMP who was responsible for selecting and employing Jaafar to function as a personal bodyguard thus enabling him to carry the said firearm*. They cannot now be heard to say they are not responsible if he had acted unlawfully in the course of his duty. It was common ground that on that fateful evening, Jaafar was performing his assignment as a bodyguard *albeit* in an illegal way.

[35] *By providing Jaafar with a firearm to perform his duty as personal bodyguard, GMP has created a risk which exposed the public to potential harm*. The risk manifested into reality when Jaafar decided to embark on a rampage for reasons only known to him. As reiterated earlier, GMP had created an opportunity for Jaafar to utilise the Glock automatic, *albeit* for wrongful intent. There is therefore little doubt that the wrongful act committed by Jaafar is closely connected with the line of work assigned to him by GMP, and for which GMP equipped him with the lethal weapon. As stated earlier, Jaafar was on duty that fateful day pursuant to his employment as a personal bodyguard.

[36] Now, *Jaafar's actions may have been unauthorised by his employer but the pertinent question to ask is whether Jaafar's actions in unlawfully discharging his firearm and causing injury to Amirul was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. On the facts of this case and for the reasons we have already stated, the answer must be yes. To put it in another way, Jaafar's wrongful act was not independent from the task he was employed to do*. In this connection, it is apposite to recall the words of Lord Millet in the House of Lords case of *Lister v. Hesley Hall Ltd* (*supra*):

> So, it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.
>
> ...
>
> The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind.

[37] There was also a common thread in the plethora of cases cited to us … in that, the nature of the work carried out by the employees exposed third parties (the innocent members of the community) to the risk or danger to their lives or safety, and, the same nature of the work allowed the malevolent employees the opportunity to commit the intentional wrong on the third parties.

A [38] In the circumstances, we find that the courts below were right in their assessment that GMP was vicariously liable for Jaafar's wrongful act ... (emphasis added)

[41] It is also useful to recall the infamous RELA urine photography incident decided in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ B 653; [2009] 6 MLJ 826 to see how the Court of Appeal dealt with the issue of vicarious liability in that case. The facts and outcome were narrated in *GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir* [2022] 10 CLJ 669:

C [43] In the Malaysian context, the Court of Appeal in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653; [2009] 6 MLJ 826 had occasion to deal with the issue of vicarious liability. The facts of the case were as follows. The respondents were, a member of Angkatan Relawan Rakyat Malaysia [RELA] (first respondent), the Director-General of RELA (second respondent), the Director of Jabatan Islam Wilayah Persekutuan Kuala Lumpur [JAWI] (third respondent) and the D Government of Malaysia (fourth respondent). The appellant was arrested by officers of the second and third respondents and put in a truck with other arrested persons in a joint operation.

[44] Sometime along the journey, the appellant asked permission from the officers to use toilet facilities. Her permission was denied and she was E asked to ease herself in the truck. Unable to control her bladder, the appellant eased herself in the truck whilst others shielded her from view by encircling her and by using a shawl. At that juncture, **the first respondent opened the truck's door, rushed in, pulled the shawl away and took photographs of the appellant squatting and urinating**.

F [45] The High Court held that:

(a) although the first respondent was carrying out their duties in their official capacity, the first respondent was never ordered to photograph any arrested person and that the camera belonged to the first respondent;

G (b) taking photographs of the appellant urinating was not part of the first respondent's duty; and

(c) therefore, the second, third and fourth respondents were not vicariously liable for the first respondent's acts.

[46] At the Court of Appeal, the findings of the learned trial judge that H the action of the first defendant was a "frolic of his own" came under serious challenge. The Court concluded, following the Privy Council decision of *Keppel Bus Co Ltd v. Sa'ad bin Ahmad* [1974] 1 LNS 62; [1974] 1 MLJ 191, that *the evidence of snapping the photographs being so closely connected to the duties of the first respondent was overwhelming. Accordingly, the second, third and fourth respondents were found vicariously liable for the wrongful act of the first* I *respondent*.

(emphasis added)

Application To Facts

[42] In my view, the four common denominators set out in *GMP Kaisar Security (M) Sdn Bhd v. Mohamad Amirul Amin Mohamed Amir* [2022] 10 CLJ 669 by the Federal Court are satisfied for these reasons:

(i) the first defendant was appointed by the plaintiff to provide property management services for Bukit Desa Condo by a written contract which was renewed yearly. (See appeal record vol. 3A pp. 12 to 21 and 22 to 51 of appeal record vol. 3A);

(ii) the first defendant provided the following staff stationed on site:

(a) one full-time building manager,

(b) one full-time administrative clerk,

(c) one full-time handyman/technician and

(d) one part-time visiting charge man.

(iii) the first plaintiff has placed the second defendant as its building manager at the plaintiff's office pursuant to its management contract with the plaintiff to manage the Bukit Desa Condo;

(iv) the misappropriation of monies could only be committed by the second defendant due to his position as the building manager at the plaintiff's office in Bukit Desa Condo. The second defendant would not have access to the plaintiff's chequebooks, FD deposit slips and financial records if not for his position as a building manager;

(v) the second defendant's unlawful action was so closely connected with his employment that it would be fair and just to hold the first defendant as his employer vicariously liable; and

(vi) the nature of the work carried out by the second defendant exposed the plaintiff to the risk of misappropriation of monies, and, the same nature of the work allowed the malevolent employee *ie*, the second defendant the opportunity to commit the misappropriation of monies on the plaintiff.

[43] In conclusion, I hold that the first defendant, as the employer of the second defendant, is vicariously liable for the second defendant's misappropriation of monies.

Ground ii – The Plaintiff Has Failed To Prove The Second Defendant Has Stolen Rm314,542.97 From The Plaintiff

[44] The Sessions Court, after hearing a total of seven witnesses, in particular, PW1 the chairman of the plaintiff, PW2 the police investigating officer, PW3 the bank officer from Public Bank, DW1 who is the second defendant/building manager of the condo/fraudster and DW4 the assistant

manager of MSM International Loss Adjuster, have made findings of fact that the plaintiff has proven the second defendant had stolen RM314,542.97 from the plaintiff. (See encl. 22 additional appeal record ground of judgment p. 32 para. 29).

[45] The finding of the Sessions Court is further supported by the first defendant's own adjuster/DW4's testimony, which stated the involvement of the second defendant, possibly with other persons, in the fraudulent acts. (See encl. 20 appeal record Part B p. 82 Q and A 9).

[46] A police report was also lodged by the plaintiff against the second defendant. PW2, the police investigating officer had testified during trial that investigation was on going. By the time of the filing of the written submissions stage the second defendant has been charged in the criminal court. (See encl. 22 para. 13 of the ground of judgment at p. 16 of additional record of appeal ("AROA")). (See also encl. 17 – p. 2841 para. 31).

[47] The fact that the second defendant has been charged in the criminal court is not disputed by the first defendant in its reply written submissions. (See encl. 17 pp. 2930 to 2931 para. 4).

[48] The law on appellate intervention on a trial judge's findings of fact is well-settled.

The Law On Appellate Intervention On A Trial Judge's Findings Of Fact

[49] In *Yahaya Mohamad v. Chin Tuan Nam* [1975] CLJU 195; [1975] 1 LNS 195; [1975] 2 MLJ 117, the trial judge had ruled in favour of the plaintiff. On appeal, the Federal Court had allowed the appeal. On appeal, the Privy Council allowed the appeal and reversed the decision of the Federal Court. The Privy Council held:

> (1) As in this case **the learned trial judge had based his finding on the evidence of the plaintiff and his witness, his finding should not have been disturbed**;
>
> (2) This was not one of those **rare cases** where an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility. There was no reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.
>
> (emphasis added)

[50] In *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2018] Supp MLJ 363 per Rauf Sharif FCJ said:

> [26] ... *the prime issue is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless* the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.
>
> (emphasis added)

[51] In *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67, the Federal Court held that:

> The Law in Appellate Intervention
>
> [33] It was a long-settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong' (the Supreme Court of United Kingdom in *McGraddie v. McGraddie And Another* [2013] 1 WLR 2477).
>
> (5) The 'plainly wrong' test operated on the principle that the trial court had had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acted on the printed records. The 'plainly wrong' test was not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. *As long as the trial court's conclusion could be supported on a rational basis in view of the material evidence, the fact that the appellate court felt like it might have decided differently was irrelevant*. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. *The trial judge should be accorded a margin of appreciation when his treatment of the evidence was examined by the appellate courts* (see paras 34, 76 & 148).
>
> (emphasis added)

[52] The following principles on when an appellate court can intervene in a trial judge's findings of fact can be distilled from the above three apex courts' decisions:

(i) the starting premise must be that as the trial judge had based his finding on the evidence of the witnesses, his finding should not be disturbed;

(ii) it is only in the rare cases where an appellate court, lacking the advantage of seeing and hearing the witnesses, is justified in coming to a different conclusion from the trial judge on a question of credibility;

(iii) it is well-settled law that an appellate court will not, generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision; and

(iv) as long as the trial court's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate court.

[53] Based on the above case law and the findings of facts by the Sessions Court, I do not think appellate intervention is warranted in this appeal.

[54] Further, the testimonies of PW1, PW3, the second defendant/DW1 and DW4 as well as the documents produced justify the Sessions Court to arrive at a finding that the plaintiff has proven the second defendant has stolen RM314,542.97 from the plaintiff. The pertinent testimonies are set out below.

Discovery Of Wrongdoings

Testimony Of PW1 Gills Marinus Geelhoed Who Is A Retired Engineer And Chairman Of The Plaintiff

(By A Witness Statement Q & A 19 To 30 In Enclosure 20 Appeal Record Part B At Page 14 Bottom Pagination)

[55] Commencing sometime on or about the first week of January 2020, PW1, who was the chairman of the plaintiff at the material time, was preparing for the year-end accounts for 2019 and compiling all bank statements, bank in slips, FD certificates, payment vouchers and other documents gathered from the plaintiff's books and records (that were kept in the plaintiff's office) for the purposes of submission to the plaintiff's auditors and for the plaintiff's internal AGM meeting when he detected a discrepancy in the plaintiff's accounts amounting to approximately RM32,000.

[56] Further inspection and scrutiny conducted by PW1 led to the discovery that the closing amount balance for January 2019 as per the bank statement was RM306,427.58 whereas the opening balance for February 2019 was RM274,362.38, a difference of approximately RM32,000.

Q & A 24

[57] Following thereto, PW1 commenced an investigation and review of the plaintiff's financial books and records, which uncovered various wrongdoings and/or breaches of the contract by the defendants. With the assistance of the plaintiff's bankers (Public Bank, Taman Desa branch), the plaintiff discovered, *inter alia*, that:

(i) bank statements gathered from the plaintiff's office showing transactions over the course of 2019 were different from the bank statements furnished by Public Bank, Taman Desa, particularly with regards to cash deposit transactions;

(ii) bank statements (from 2016 to 2019) and bank in slips for cash deposit transactions that were in the plaintiff's possession, were counterfeit;

(iii) of the 33 FD certificates that were in the plaintiff's possession, according to Public Bank's records, the plaintiff had only placed 24 fixed deposits with the bank and the balance of nine FD certificates (totalling RM305,000 in value) were never placed with the bank;

(iv) all 33 FD certificates that were in the plaintiff's possession were counterfeit;

(v) for the accounting period for 2019, one Public Bank cheque for the sum of RM50,000 that was given by the admin clerk, Cik Siti Zarina, to the second defendant for placement in the plaintiff's Al-Wadiah's FD account was never placed in the said account;

(vi) for the accounting period from 2017 to 2018, eight cheques totalling RM255,000 that were given by the admin clerk, Cik Siti Zarina, to the second defendant for placement in the plaintiff's Al-Wadiah's FD account were never placed in the said account;

(vii) there were missing cash deposits for the accounting year from 2017 to 2019, totalling RM310,686.63;

(viii) unidentified cash and cheque deposits were made into the plaintiff's account; and

(ix) unidentified deposits were made into the plaintiff's account from the second defendant's own personal account.

(Hereinafter referred to as the "fraudulent acts").

Testimony Of Tan Ching Sein PW3 Public Bank Banking Services Manager

(See Witness Statement Q & A 11 To 35 In Enclosure 20 Appeal Record Part B At Page 31 Bottom Pagination)

[58] PW3, the Public Bank manager, testified on the falsity of bank documents as follows:

Q and A 11, 12 and 18 - 22 on bank statements

(i) in respect of bank statements that were in the plaintiff's possession and custody the following are counterfeit/not genuine documents:

(a) pages 1007 to 1110 of Bundle E;

(b) pages 903 to 1006 of Bundle D;

(c) other than pp. 707 to 746 (statement of 02/2016 - 06/2016), pp. 837 to 852 (statement of 06/2017 - 07/2017), pp. 863 to 884 (statement of 09/2017 - 11/2017) and pp. 894 to 902 (statement of 01/2018), the remainder from pp. 707 to 902 of bundle D;

Q and A 24 on deposit/bank in slips

(ii) in respect of Public Bank deposit/bank in slips, other than at pp. 1111 (item 1 and 2), pp. 1119 to 1124, pp. 1192 to 1200, the rest of pp. 1111 to 1311 of bundle E are not genuine/counterfeit Public Bank deposit/ in slips;

Q and A 28 on FD certificates

(iii) in respect of the 33 FD certificates, all of the documents appearing at pp. 1312 to 1322 of Bundle E are counterfeit, made to look or appear as genuine Public Bank FD certificates.

[59] PW3 further testified in Q and A 35, "I believe whoever prepared these voluminous counterfeit documents took careful and calculated steps to make the documents look real, in order to fool PPDBK into believing that the transactions were real". (See encl. 20 appeal record Part B at p. 41 bottom pagination).

Testimony Of The Second Defendant Identified As DW1

[60] The second defendant identified as DW1, was called as a witness by the first defendant. A perusal of the examination-in-chief shows that the second defendant was never asked whether he had stolen the monies from the plaintiff. (See encl. 19 notes of proceedings appeal record Part D pp. 3165 to 3171). There is therefore no statement on oath by the second defendant that he did not steal any monies from the plaintiff.

Judgment In Default Of Appearance Obtained Against The Second Defendant

[61] In reality, the second defendant cannot deny that he has stolen the monies as although he was served with the writ of summons, he never filed an appearance to defend the claim. He also never set aside the judgment obtained against him.

[62] During trial under cross-examination, the second defendant admitted he was served with the writ of summons, he never filed an appearance to defend the claim and he did not apply to set aside the default judgment obtained against him. (See encl. 19 notes of proceeding pp. 3182 to 3183).

[63] As the judgment was never set aside by the second defendant, they remain as valid judgment and proof of fraud by the second defendant. (See *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987).

[64] In *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987, the Federal Court held as follows:

> [9] By that, *the trial court clearly held that fraud had been made out against first to fourth respondents and so needed not to be proved*. Indeed, *when the first to fourth respondents failed to defend the claim, it should be assumed that the appellants had made out fraud against the first to fourth respondents. It would be against all good sense and logic, quixotic in fact, to hold that an allegation, although unanswered, must yet be proved*. In *Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad Abang Anding* [1979] 1 LNS 16; [1979] 2 MLJ 185, where the plaintiff, who had obtained interlocutory judgment in default, applied for assessment of damages, Seah J, as he then was, duly assumed that all allegations in the statement of claim were deemed as proved.
>
> (emphasis added)

[65] In the appeal before me, counsel for the first defendant, Ms Jennifer Hiu Jing Yin, submitted forcefully that PW3, the Public Bank manager, is not an expert on forgeries. With respect, PW3 is testifying based on the documents and records in the bank. PW3 need not be an expert on forgeries. In any event, it is not the first defendant's defence that the records of Public Bank are wrong or contain forgeries.

[66] In conclusion, I dismiss ground [ii] of the appeal by the first defendant. I hold that the plaintiff has proven that the second defendant has stolen RM314,542.97 from the plaintiff.

Ground iii - The Sessions Court Had Erred In Failing To Consider The Plaintiff's Contributory Negligence

[67] The first defendant alleges that the plaintiff had been negligent to allow the second defendant to steal the plaintiff's monies.

[68] In my view, this argument has no merits. As a matter of law, the plaintiff's negligence – assuming it is true – can never be a defence to a claim in fraud. A fraudster is not allowed to say if you had been more careful I would not have been able to steal from you.

[69] The defence of negligence is not available to an employee who has stolen money. No such defence is also available to the employer who is vicariously liable. Vicarious liability is in reality a specie of strict liability. It is not premised on any culpable act or omission on the part of the employer. An employer who is not personally at fault is made legally answerable for the fault of his employee.

(See *Lee Woon Jeng v. Excel Champ Automobile Sdn Bhd* [2015] 5 CLJ 979 per Harmindar Singh Dhaliwal J at [58 to 64] citing *Redgrave v. Hurd* [1881] 20 Ch D1 and *Standard Chartered Bank v. Pakistan National Shipping Corporation And Others (Nos 2 And 4)* [2003] 1 AC 959 per Lord Hoffmann).

[70] The same argument of contributory negligence was raised by the employer of the fraudster employee in *Lee Woon Jeng v. Excel Champ Automobile Sdn Bhd* [2015] 5 CLJ 979. It was rejected by Harmindar Singh Dhaliwal J in these terms:

> Negligence of Plaintiff
>
> [58] In this regard, the learned Magistrate had made a finding that the plaintiff was negligent by giving a cheque to GKL without entering the payee's name. In rejecting the claim, the learned Magistrate surmised that the plaintiff had only himself to blame. In essence, the argument here is that with due diligence on the part of the plaintiff the fraud by GKL could have been prevented.
>
> [59] It appears that by his reasoning, the learned Magistrate had introduced the concept of negligence in his determination of whether GKL's act was within the ordinary course of business. Vicarious liability is in reality a specie of strict liability as observed by Lord Millet in *Lister*.

A It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss-distribution device (*Lister*, *supra* at para. [65]).

[60] This finding raises the question - **can the plaintiff's negligence be a**
B **defence to claim in fraud**? In this regard, the old case of *Redgrave v. Hurd* [1881] 20 Ch D 1 is instructive. In that case, the plaintiff, an elderly solicitor, published an advertisement in the newspapers to sell of his practice which he claimed generated a yearly income of £300. The defendant made enquiries with the plaintiff on the value of the practice and was told that the relevant documents showed how the yearly income
C was comprised of. The defendant only looked cursorily and did not examine in detail, the documents which comprised of some letter-books, diaries and a day-book and ultimately entered into an agreement to purchase the house and share in the business for £1600.

[61] Upon entering into agreement, the defendant discovered that the
D practice was practically worthless and refused to complete the purchase. Upon the plaintiff's suit for specific performance, the defendant disputed the claim on the ground of misrepresentations as to the business. The plaintiff's argument against misrepresentation was the defendant could have, with due diligence, checked the documents thoroughly before deciding to enter into the agreement.

E [62] In allowing the appeal, Jessel MR observed (at p. 130): There is another proposition of law of very great importance which I think it is necessary for me to state, … *If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the*
F *means afforded you of discovering its falsity, and did not choose to avail yourself to them ... Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.*

[63] The decision was considered by the House of Lords in *Standard Chartered Bank v. Pakistan National Shipping Corporation And Others (Nos 2 and*
G *4)* [2003] 1 AC 959 where the relevant point was succinctly stated by Lord Hoffmann as follows (at p. 966): It would be more accurate to say that it was careless in making payment against documents which, as it knew or ought to have known, did not comply with the terms of the credit, on the assumption that it could successfully conceal these matters from
H Incombank. In respect of the loss suffered, SCB was in my opinion negligent. Be that as it may, the real question is whether the conduct of SCB would at common law be a defence to the claim in deceit … This case seems to me to show that if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known it was false, it does not matter that he also held
I some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid … In my opinion, the law takes

no account of these other reasons for payment. This rule seems to me based upon sound policy. *It would not seem just that a fraudulent defendant's liability should be reduced on the grounds that, for whatever reason, the victim should not have made the payment which the defendant successfully induced him to make.*

[64] *It would therefore appear that the defence of negligence would not be available to GKL. It must also follow that no such defence ought to be available to the employer*. This contention is therefore without merit …

(emphasis added)

The Plaintiff's Alleged Contributory Negligence Not Proven

[71] In any event, even if the first defendant is allowed to run the defence of negligence by the plaintiff, which I have answered in the negative above, the first defendant has not proven its assertion that the misappropriation of monies by the second defendant was caused or contributed by the plaintiff's alleged contributory negligence. Such is the finding of the Sessions Court. I see no cogent evidence for appellate intervention on such finding of fact by the court below.

[72] In conclusion, I dismiss ground [iii] of the appeal by the first defendant. I hold that the Sessions Court had not erred in failing to consider the plaintiff's alleged contributory negligence.

[73] In view of my decision on the above three grounds, there is no necessity for me to deal with other grounds raised by the first defendant.

Decision

[74] For the reasons stated above, I maintain the award of RM314,542.97 in favour of the plaintiff.